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No. 10-1065

IN THE

Supreme Court of the United States

O.K. INDUSTRIES, INC., O.K. FOODS, INC., O.K. FARMS, INC., AND O.K. BROILER FARMS LIMITED PARTNERSHIP,
Petitioners,

v.

CHARLES BEEN, DON FROST, ROBERT FIELDS, EUGENE JOHNSON, AND EUGENE BLACKWELL, INDIVIDUALLY AND ON BEHALF OF OTHERS SIMILARLY SITUATED,
Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Tenth Circuit

REPLY BRIEF FOR PETITIONERS

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Petition for a Writ of Certiorari to the United States Court of Appeals for the Tenth Circuit

REPLY BRIEF FOR PETITIONERS [1]

ARGUMENT

I. INTRODUCTION

Respondents make three contentions. First, that Petitioners ("O.K.") cite illusory conflicts between the decision below and those of other circuits, *e.g.*, *Brokerage Concepts, Inc. v. U.S. Healthcare, Inc.*, 140 F.3d 494, 517 (3rd Cir. 1998) (20-25% market share excludes market power as a matter of law), and *Republic Tobacco Co. v. North Atlantic Trading*

[1] Petitioners' Rule 29.6 Statement appears at Pet. ii

Co., Inc., 381 F.3d 717, 737 (7th Cir. 2004) (actual detrimental effects analysis cannot substitute for showing market power in cases challenging vertical restraints). Respondents contend that the Tenth Circuit's decision held that the standards governing competitive injury under the Packers and Stockyards Act ("PSA") 7 U.S.C. § 192(a) differ from those applicable under the Sherman Act 15 U.S.C. §§ 1,2.

Respondents' argument supplies an additional reason why the Court should grant the Petition: Respondents' argument has brought to more focused light a pertinent, fundamental Circuit conflict between the circuits with respect to PSA. The Fourth, Fifth, Sixth, Seventh, Eighth, Ninth, and Eleventh Circuits have all held that PSA "unfairness" claimants must prove "injury to competition," because the PSA incorporates the basic Sherman Act blueprint, *De Jong Packing Co. v. United States Dept. of Agriculture*, 618 F.2d 1329, 1335 n. 7 (9th Cir.) *cert. denied*, 449 U.S. 1061 (1980).[2]

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[2] *See also, Terry v. Tyson Farms, Inc.*, 604 F.3d 272, 276-79 (6th Cir. 2010), *cert. denied*, 2011 WL 197656 (U.S. Jan. 24, 2011); *Wheeler v. Pilgrim's Pride Corp.*, 591 F.3d 355 (5th Cir. 2009) (en banc); *Pickett v. Tyson Fresh Meats, Inc.*, 420 F.3d 1272, 1280 (11th Cir. 2005), *cert. denied*, 547 U.S. 1040 (2006); *London v. Fieldale Farms Corp.*, 410 F.3d 1295, 1303 (11th Cir.), *cert. denied*, 546 U.S. 1034 (2005); *IBP, Inc. v. Glickman*, 187 F.3d 974, 977 (8th Cir. 1999); *Philson v. Goldsboro Milling Co.*, 1998 WL 709324 at *4-5 (4th Cir. Oct. 5, 1998); *Jackson v. Swift Eckrich, Inc.*, 53 F.3d 1452, 1458 (8th Cir. 1995); *Farrow v. U.S. Dep't of Agric.*, 760 F.2d 211, 215 (8th Cir. 1985); *Pac. Trading Co. v. Wilson & Co.*, 547 F.2d 367, 369-70 (7th Cir. 1976).

Nothing in any decision from the seven other circuits suggests that injury to competition under the PSA differs from injury to competition under the Sherman Act, or that agricultural markets are more susceptible to anticompetitive practices than non-agricultural markets. Respondents' own reading of the Tenth Circuit's opinion places that decision in significant conflict with the decisions of the other circuits that have addressed this PSA issue. For example, *London v. Fieldale Farms, Inc.*, 410 F.3d at 1365, affirmed a summary judgment in favor of a poultry processor because the grower-plaintiff submitted no evidence that the processor had market power as that concept is understood under the Sherman Act (and competition law cases generally). *London* specifically noted that its grower-plaintiff had introduced no evidence of the defendant processor's market share.

Second, Respondents suggest that the market power issue was waived. The Tenth Circuit actually decided the issue raised by the petition with no suggestion that it was conducting a "plain error" review. The Circuit was led to conduct a plenary review of this question by *Aspen Highlands Skiing Co. v. Aspen Skiing Co.*, 738 F.2d 1509, 1518 (10th Cir. 1984), *aff'd*, 472 U.S. 585 (1985), which held that an issue raised in a motion for judgment as a matter of law is not waived if the defendant later fails to object to an instruction embodying a contrary rule. This Court subsequently granted certiorari to decide the very question *Aspen Highlands'* respondent claimed had been waived. Respondents' waiver contention provides no basis for denying review of the market power issue raised in the petition.

Finally, Respondents dispute O.K.'s contention that the PSA's limitation to practices used "with respect to live poultry" means that if there is no evidence that O.K. suppressed the production of any live birds under its control, it cannot as a matter of law be found liable for having reduced its production. Furthermore, as O.K. noted to both the trial court and the Tenth Circuit, this defect cannot be addressed by claims that O.K. failed to produce at hypothetical levels, such as the level that "perfect competition" for grower services would supposedly generate.

O.K. specifically noted on the Record, when it moved to dismiss Growers' claim as a matter of law for insufficiency, that there was an absence of evidence showing a "practice with respect to live poultry" that suppressed production. The Tenth Circuit's holding effectively requires processors to produce at or above capacity without regard to economic conditions or the availability of "extra chicks" to supplement the output from their own hatcheries. This is an important question of statutory interpretation governing activities in the nation's vital food industry. The issue of the legal sufficiency of such evidence under a proper interpretation of the statute was never waived and is properly before this Court, and warrants review as well.

II. THE TENTH CIRCUIT'S DECISION CONFLICTS WITH THOSE OF OTHER CIRCUITS BY HOLDING THAT UNILATERAL CONDUCT MAY INJURE COMPETITION WITHOUT A SHOWING OF MARKET POWER.

Respondents do not contend that O.K. wields market power under Sherman Act standards given its negligible share of the output market and its sales by competitive bid there. O.K.'s substantially-increased output across the relevant period, during which consumer prices also steadily fell, confirms that total output to the market was not perniciously "reduced" by anything O.K. did. Respondents likewise do not argue that O.K. misreads *FTC v. Indiana Federation of Dentists*, 476 U.S. 447, 460 (1986) when O.K. claims that evidence of putative anticompetitive effects cannot substitute for market power in cases challenging unilateral conduct or vertical restraints. Such a license is issued to plaintiffs when they challenge horizontal restraints that facially restrict output. *See Republic Tobacco*, 381 F.3d at 737.

Respondents avoid market power concerns by embracing the understanding that the Tenth Circuit has held market power unnecessary to be proved in a PSA case against a monopsony because the competitive injury standards governing the Sherman Act and the PSA are different. By assuming that the effect (injury to competition) may exist without the cause (market power), the Tenth Circuit's holding renders PSA claims economically irrational.

As a matter of basic economics and of law, parties holding a 2% share of the output market, acting unilaterally, are unable to injure competition. *See*,

e.g., *Valley Liquors, Inc. v. Renfield Importers, Ltd.*, 822 F.2d 656, 667 (7th Cir.) *cert. denied*, 484 U.S. 977 (1987); *Dimmit Agri. Indus., Inc., v. CPC Int'l, Inc.*, 679 F.2d 516, 530 (5th Cir. 1982). If Respondents' assertion is correct, no circuit, save the court below, has ever suggested that standards for competitive injury under the PSA or Sherman Act depart from such fundamental economic principles.

A.A. Poultry Farms, Inc. v. Rose Acre Farms, Inc., 881 F.2d 1396 (7th Cir. 1989) explains why price manipulation is the rare exception in agricultural markets:

> Economists frequently give agricultural products like wheat as an example of perfect competition. Concentration is low and the product is fungible. Anyone who tries to charge more than the going price loses sales quickly....

Id., at 1397 (Easterbrook, J.) Dismissals as a matter of law in favor of defendants with negligible market shares occur not because particular words in the Sherman Act command such a result, but because logic, experience, and settled economics do.

Respondents attempt to circumvent this basic point by contending that Sherman Act cases relax the market power requirement if a monopsony is challenged, relying on both *Mandeville Island Farms, Inc. v. American Crystal Sugar Co.*, 334 U.S. 219 (1948) and *Telecor Commc'ns, Inc. v. Southwestern Bell Tel. Co.*, 305 F.3d 1124 (10th Cir. 2003), *cert. denied*, 538 U.S. 1131 (2003). Neither case supports their position.

Mandeville Island did not address market power because plaintiffs challenged a horizontal price-fixing buyer's cartel. The challenged conduct was illegal *per*

se, rendering it unnecessary for sellers to prove that the cartel had market power.

Telecor's plaintiff *lost* its Sherman Act claim, 305 F.3d, at 1129, but prevailed under a state statute more broadly drawn than the Sherman Act. *See Harold's Stores, Inc., v. Dillard's Dept. Stores, Inc.*, 82 F.3d 1533, 1550 (10th Cir. 1996). If the liability *formulae* of the state statute and the Sherman Act had been identical, a new trial would have been necessary because the verdicts would have been fatally inconsistent. *Telecor*'s facts showed that its defendant injured consumers by charging supra-competitive pay phone tolls, which was possible because the defendant held a localized *monopoly* (with respect to consumers) that had arisen over many decades when it was the only party legally entitled to operate pay phones. The defendant in those years was the only possible "buyer" for likely pay phone sites, and thus a monopsony with respect to location owners as well. Beginning in the early 1990's, *Telecor*'s defendant quickly leased almost every other likely pay phone location in the local market in order to prevent future competitive entry once pay phone service was de-regulated. Locking up sites allowed the defendant to maintain its output monopoly after de-regulation, and to continue charging uncompetitive tolls: if others enjoyed access to the market, and could "de-monopolize" it, competition would force tolls down from 50-cents, to the competitive 35-cent level.

Telecor cannot sensibly be read to hold that input monopsonies, *simpliciter*, inherently cause competitive injury, or that all monopsonies have inherent power to restrict output-market competition and raise consumer prices. As noted in the Petition, economic

theorists reject that proposition, and Respondents cited no authorities who support a contrary position.

Respondents argue, finally, that cases such as *Republic Tobacco, supra,* and *Deutscher Tennis Bund GmBH v. ATP Tour, Inc.,* 610 F.3d 820 (3rd Cir.), *cert. denied*, 131 S. Ct. 658 (2010) do not conflict with the decision below because they involve harm from acts done in the output market, whereas this case involves an input market monopsony. The argument is economically unsound. The only reason competition law concerns itself with input monopsonies is because, by restraining its demand for an input, it is possible for a monopsonist to restrain the *total* amount supplied by *all* producers. That is possible, however, only if the monpsonist's own total production "looms so large" in relation to others', that its own shortfall cannot be addressed by increased production from rivals. *Cf. L.A.P.D., Inc. v. Gen. Elec. Corp.*, 132 F.3d 402, 405 (7th Cir. 1998).

A reduction in *total* output to the market will injure competition; reduction in total output from one small source of supply will not. A "reduction" in total supply capable of distorting total production into the output market requires "market power". That term bears the same sense no matter what statute (PSA or Sherman Act) is being studied. There is no rational or legal economic case to be made for treating monopsony under the PSA any differently from the Sherman Act. PSA's roots are in the Sherman Act. When a later statute accepts terms and principles transplanted from an earlier statute, those terms and principles "bring their soil with them." Felix Frankfurter, *Some Reflections on the Reading of Statutes*, 47 Colum. L. Rev. 527, 537 (1947). Respondents' argument that the Tenth Circuit has created an

exception unrecognized by other circuits provides additional support for the necessity of a grant of certiorari.

III. THE PLAIN LANGUAGE OF THE PSA OBLIGES GROWERS TO SHOW THAT PRODUCTION WAS REDUCED AS A RESULT OF PRACTICES USED WITH RESPECT TO ACTUAL LIVE BIRDS.

The scope of PSA liability is boundless if courts may assess damages based on animals never actually in the "flow" of commerce, but on animals that might have been so produced if O.K.'s capacity were sufficiently great to meet Growers' demands (as opposed to consumers'). Nothing in the legislative history or in the case law sanctions so expansive a view.

Respondents' opposition invokes two cases broadly interpreting insurance policies to urge a similarly broad construction of the PSA, claiming that such authorities understand the phrase "with respect to" as requiring only that "some relationship" be shown between O.K.'s practices and its "total production." *E.g., Hartford Cas. Co. v. Travelers Indemnity Co.*, 110 Cal. App. 4th 710, 719-20 (2003). Courts interpreting insurance policies do so most strongly against the drafter's intent. In contrast, courts interpreting statutes must positively determine and execute the legislature's intent. In doing so, statutory language must be interpreted to avoid unreasonable consequences. *Birdwell v. Skeen*, 983 F.2d 1332, 1337 (5th Cir. 1993).

Remedial statutes are not infinitely elastic: *Arnett v. United States*, 889 F. Supp. 1424, 1427 (D. Kan 1995), for example, held that a statute forbidding certain conduct "in connection with" collecting a tax

did not apply to assessing the tax, even though the two are part of the same process and bear "some relationship" with one another. Similarly, *Michigan Protection & Advocacy Center v. Babin*, 799 F. Supp. 695, 716 (E.D. Mich), *aff'd* 18 F.3d 337 (6th Cir. 1993), concluded that a statute forbidding discrimination "with respect" to the sale of property only regulated the conduct of parties to the sale, not third parties trying to prevent it. Respondents' argument that PSA is a remedial statute to be interpreted broadly ignores the fact that the Sherman Act, too, is remedial. Nothing in Sherman's language requires a showing of market power, or that agreements be scrutinized under the Rule of Reason. These requirements are the product of sound construction. Sound construction should apply as well to the plain language of PSA.

In this connection, *Blue Chip Stamps v. Manor Drug Stores, Inc.*, 421 U.S. 723 (1975) held that an actual "purchase or sale" of a security must be proved under a rule forbidding deception "in connection with the purchase or sale of a security." *Blue Chip Stamps* noted that a failure to confine the scope of the rule to actual transactions would open the way for parties to claim profits that they, hypothetically, would have made if an initial purchase had not been discouraged. Respondents below complained that under their contract with O.K., they did not produce as much as they would have if, hypothetically, many buyers had competed for their services. Focus on chimeras like "perfect competition" ignores a very real, limiting contingency, *viz.*, that even if ten other processors operated nearby, O.K. could never have produced more than it hatched.

Statutes must be construed to take market participants as they are, and regulate their actual acts and capabilities to act, without investing them with powers they do not have, in order to penalize them for failing to achieve production levels they are unable to attain. Statutes should be interpreted to provide a rational response to a relevant situation. *Soloman Forex, Inc. v. Tauber*, 8 F.3d 966 (4th Cir. 1993), *cert. denied*, 511 U.S. 1031 (1994). Enforcing the plain-language limitation on PSA's breadth, and obliging Respondents to prove unfair practices that were used "with respect to live poultry," advances every legitimate aim of a statute passed to remove burdens on the flow of meat to market, without creating arbitrary benchmarks that oblige processors to guess what their output would be if competitive conditions were somehow "perfect," especially where they cannot change the fact that certain sellers lack the ability to sell their services elsewhere.

CONCLUSION

For the foregoing reasons, and those stated in the petition, the petition should be granted and the judgment below reversed.

Respectfully submitted,

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